

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

October 15, 2008 Session

IN RE L.D.T., C.D., B.D.

**Appeal from the Juvenile Court for Davidson County
No. 2006-002804 and 2006-002801 Betty Adams Green, Judge**

No. M2008-00981-COA-R3-PT - Filed February 11, 2009

Mother and Father appeal the order of the Juvenile Court for Davidson County, Tennessee, terminating their parental rights based upon Father's abandonment by failure to support, and the parents' abandonment by failure to establish a suitable home; their substantial non-compliance with the permanency plan; the persistence of conditions that prevent return of the children; and finding that termination was in the best interest of the children. Finding by clear and convincing evidence that grounds for termination exist and that termination is in the best interest of the children, we affirm the trial court's ruling.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which WALTER C. KURTZ, SR. J., and, FRANK G. CLEMENT JR., J. joined.

C. Michael Cardwell and Stephen Mills, Nashville, Tennessee, for the appellants, K. L. D. and D. R. D.

Robert E. Cooper and Preston Shipp, Nashville, Tennessee, for the appellee, Tennessee Department of Children's Services.

OPINION

On April 13, 2006, the Department of Children's Services ("DCS") received a referral due to K. L. D. and D. R. D.'s (hereinafter "Mother" and "Father", respectively of "the parents") drug use around the three children living with them, LDT¹ (DOB 6/5/94), BTD (DOB 4/5/00) and CJD (DOB 6/4/02); the condition of the home; and domestic violence issues between the parents. DCS conducted interviews with the children and the parents, all of whom confirmed there was drug use and violence in the home. Father also admitted that he was a twice-convicted sex offender (1989 and 2000) and had been placed on the sex offender registry, but had failed to comply with its

¹ The parental rights of LDT's father were terminated by this action but he has not appealed the termination of his rights.

requirements. DCS created a safety plan, placing LDT with his maternal grandmother and BTB and CJD with their paternal grandparents.

On July 3, 2006, due to LDT's poor behavior with his maternal grandmother and a home study finding BTB and CJD's paternal grandparents' home to be inappropriate, the trial court entered an emergency protective custody order placing all three boys in DCS custody due to dependency and neglect. DCS thereafter developed a permanency plan in which the parents participated. The plan required Mother to complete an alcohol and drug assessment and follow all resulting recommendations; submit to random drug screens; participate in a support group for people with substance abuse problems and connect with a sponsor with five years of sobriety; complete the "Peace" domestic violence program; check into TennCare availability; and seek to resolve marital and budgeting issues. The plan required Father to do all of the same and additionally required him to submit to a psychosexual evaluation; follow all resulting recommendations; and comply with the requirements of the sex offender registry. The goals of this permanency plan were for the children to exit DCS custody to live with relatives or to reunify with the parents.

On March 1, 2007, a second permanency plan was developed because the parents were not making substantial progress under the original plan. This second plan also had modified goals of reuniting the children with the parents or placing them for adoption because there were no relatives with whom the children could appropriately be placed. The second plan added two requirements - any adult living with the parents had to submit to and pass random drug screens and had to refrain from using violence. These requirements were added because Mother's adult son had moved into the parents' home and used Xanax and crack cocaine with Mother.

On June 25, 2007, DCS filed a Petition for Termination of Parental Rights, alleging abandonment by failure to visit or support; abandonment by failure to establish a suitable home; substantial non-compliance with the permanency plan; persistence of conditions that prevent return; and best interest of the children. Specifically, DCS alleged that Mother had not contributed to the support of her children since June 30, 2006, and that Father had not contributed to the support of his children since June 30, 2006. DCS alleged that, despite DCS's efforts to assist them, the parents made no reasonable effort to establish a suitable home for the children.

Regarding the permanency plan, Mother completed the required anger management, parenting and domestic violence courses, and she regularly attended support group meetings. She attempted several in- and out-patient drug treatment programs over the course of 2007, finally completing a 45-day in-patient program in October 2007, but relapsing three weeks later. Visitation supervisors sometimes observed Mother to be intoxicated during the parents' visits with the children. Father completed the required drug and alcohol assessment; regularly attended AA or NA meetings and had a sponsor. He also completed the "Peace" domestic violence program and had a psychosexual evaluation, but he failed to follow the resulting recommendations.

Violence continued to be a problem for both Mother and Father despite their taking the domestic violence courses. At the time of the trial court hearings on DCS' petition, Mother was on

probation for assault against her adult son. Father was arrested three times since the children were placed in protective custody, two of those times were for violence against a family member. Prior to trial, Father separated from Mother and was living with his parents, but he had not filed for divorce.

The hearing on DCS' Petition for Termination of Parental Rights occurred over four days: November 9, 2007; March 4 – 5, 2008; and March 25, 2008. In its Final Order, the trial court terminated the parents' parental rights to their children on the bases of Father's abandonment by failure to support; the parents' abandonment by failure to establish a suitable home; their substantial non-compliance with the permanency plan; the persistence of conditions that prevent return; and its finding that termination of parental rights was in best interest of the children. Mother and Father appeal.

STANDARD OF REVIEW

This court never takes the issue of terminating parental rights lightly and renders its decision only after intense examination of the facts and the law. Due to the grave consequences that accompany such decisions, courts must apply individualized decision-making to a termination decision. *See In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999). The court first determines what standard of review must be applied and then turns to Tenn. Code Ann. § 36-1-113, the controlling statute, to determine whether a parent's rights should be terminated. The court must first find that at least one of the grounds for termination listed in the statute exists in the case at hand; secondly, the court must find that terminating the parental rights is in the best interest of the child.

In accordance with Tenn. R. App. P. 13(d), this court must review each of the trial court's specific findings of fact *de novo* with a presumption of correctness, unless the evidence preponderates otherwise. Then, the court must determine whether the facts, either as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements necessary to terminate parental rights. *See Jones v. Garrett*, 92 S.W.3d 838 (Tenn. 2002); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

Because the decision to terminate parental rights affects fundamental constitutional rights and carries grave consequences, courts apply a higher standard of proof when adjudicating termination cases. A court may terminate a person's parental rights only if (1) the existence of at least one statutory ground is proven by clear and convincing evidence, and (2) it is shown, also by clear and convincing evidence, that termination of the parent's rights is in the best interest of the child. *See* Tenn. Code Ann. § 36-1-113; *In re Adoption of A.M.H.*, 215 S.W.3d 793, 808-09 (Tenn. 2007); *In re Valentine*, 79 S.W.3d at 546. "This heightened standard . . . serves to prevent the unwarranted termination or interference with the biological parents' rights to their children." *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998).

In order to be clear and convincing, evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence. *See In re Valentine*, 79

S.W.3d at 546 (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)). Such evidence should produce in the fact-finder's mind a firm belief or conviction as to the truth of the allegations sought to be established. See *In re M.L.P.*, 228 S.W.3d 139, 143 (Tenn. Ct. App. 2007); *In re Georgianna H.*, 205 S.W.3d 508, 516 (Tenn. Ct. App. 2006). In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is "highly probable" as opposed to merely "more probable than not." *In re M.A.R.*, 183 S.W.3d 652, 660 (Tenn. Ct. App. 2005). The burden is on the party seeking to terminate parental rights to present clear and convincing evidence that grounds exist and that termination would serve the best interests of the children. See Tenn. Code Ann. § 36-1-113(c)(1), (2).

ANALYSIS

I. Abandonment

Tenn. Code Ann. § 36-1-113(g)(1) designates "abandonment," as defined in Tenn. Code Ann. § 36-1-102, as a ground for terminating parental rights. Tenn. Code Ann. § 36-1-102(1)(A)(i) defines "abandonment" in part pertinent to this appeal as follows:

For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child.

Id.

In order to find "abandonment," there must be either "willful" failure of visitations or "willful" failure to render support by the parent whose rights are being terminated. As found by the court in *In re S.M.*, 149 S.W.3d 632, 642 (Tenn. Ct. App. 2004), "willfulness" in parental rights cases does not require the same standard of culpability required by the penal code nor does it require malevolence or ill will. Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. Conduct is "willful" if it is the product of free will rather than coercion. Thus, a person acts "willfully" if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing. See *id.* (citations omitted).

The trial court found that Father abandoned his children, BTB and CJD, by willfully failing to provide monetary support for four consecutive months immediately preceding the filing of the petition. By Order of the Juvenile Court of Davidson County entered November 20, 2006, Father was ordered to pay \$144.50 per month per child. Records maintained by the Department of Human Services, Child Support Services, indicate that Father did not make any payments during the four months preceding the filing of the petition.

Father testified that he is a self-employed satellite technician subcontractor. He covers the Middle Tennessee area and works on commission. In the six months prior to trial, Father testified that he worked an average of 40 to 50 hours per week, receiving generally between \$35 and \$165 per job, but receiving as much as \$400 per commercial job. Father testified that he was ordered to pay child support starting December 2006. On behalf of BTB, Father made his first child support payment on July 2, 2007, and his last payment on November 27, 2007, for a total of \$1,498.33. On behalf of CJD, Father made his first payment on August 8, 2007. He testified that his last payment was made on March 3, 2008, the day before the hearings resumed, but this could not be verified. The record introduced at trial reflects the last payment to be on November 27, 2007, and the total paid to be \$1,348.33. Father that his taxable income for 2007 was \$30,105 and that he expected his 2008 income to be higher, stating that he generally earns closer to \$50,000.

We agree with the trial court that Father's history of support for his children shows willful failure to make reasonable payments toward their support. Father was gainfully employed during this period; knew how to make the child support payments; and provided no justifiable excuse to the court as to why the child support order was not followed.

II. Substantial Noncompliance with Permanency Plans

Tenn. Code Ann. § 36-1-113(g)(2) provides that substantial noncompliance with a permanency plan is a ground for termination of parental rights. In order for noncompliance to justify the termination of parental rights, it must be "substantial." *In re S.H.*, No. M2007-01718-COA-R3-PT, 2008 WL 1901118, at *7 (Tenn. Ct. App. Apr. 30, 2008) (no Tenn. R. App. P. 11 application filed). Mere technical noncompliance by itself is not sufficient to justify the termination of parental rights. *See id.* Noncompliance with requirements in a permanency plan that are neither reasonable nor related to remedying the conditions that led to the removal of the child from the parents' custody is not relevant for purposes of Tenn. Code Ann. § 36-1-113(g)(2). *See id.* (citing *In re Valentine*, 79 S.W.3d at 548-49). Additionally, the parents' degree of noncompliance with a reasonable and related requirement must be assessed. *See id.*

The trial court found that neither Mother nor Father substantially complied with the permanency plan. DCS helped Mother schedule her initial alcohol and drug assessment; reminded her of her appointment; provided bus passes for transportation; and helped her understand what the domestic violence program entailed. DCS also provided the parents with lists and contact information for various providers; arranged random drug screens; facilitated visitations; and followed up with providers to ensure the parents were complying with the programs. While Mother and Father did complete some of the requirements on the plan, such as completing domestic violence classes, the trial court found that they did not incorporate those programs into their lives. Since entering and/or completing the domestic violence course, Mother and Father have been arrested on domestic violence charges. Since completing alcohol and drug rehabilitation, Mother and Father have tested positive for drugs. Since completing the psychosexual evaluation, Father has not provided proof that he followed the recommendations in that evaluation.

We agree with the trial court. The parents' drug use was one of the main reasons the children were removed from the home. Mother continued to use drugs up to the time of trial. She appeared to be under the influence of drugs or alcohol at one of the visits with her children, and she failed a drug screen administered to her on November 9, 2007. Further, Mother testified that she used crack cocaine approximately one week before the second day of trial, March, 4, 2008, and that she had used drugs with her adult son. While Mother completed a substance abuse treatment program, she relapsed approximately three weeks after being discharged.

Father testified that he did not follow the recommendations after his psychosexual evaluation. While the Father testified that he no longer uses illegal drugs and has not done so since December 27, 2006, he had a positive drug screen in November 2007. The parents also continue to struggle with domestic violence issues. The responsibilities outlined in the permanency plans were reasonable and necessary for the achievement of the goals and were related to remedying the conditions that necessitated foster care. Mother and Father knew what was expected of them under the plans, but failed to substantially comply with the requirements of those plans.

III. Failure to Remedy Persistent Conditions Preventing Reunification

Tenn. Code Ann. § 36-1-113(g)(3) provides that parental rights may be terminated when:

The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

- (A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;
- (B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and
- (C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home[.]

Id. In order to terminate parental rights based upon this ground, the party seeking termination must prove the existence of each of these factors by clear and convincing evidence. *See In re Valentine*, 79 S.W.3d at 550.

The children were removed from the parents' home and entered DCS' custody on July 3, 2006, based upon the parents' drug use and domestic violence. The trial court found that the conditions which led to the children's removal or other conditions which in all reasonable probability would

cause the children to be subjected to further abuse or neglect and which prevented their safe return to the care of Mother and Father, still exist. Mother did not present any plan for providing living arrangements such that it would be safe to return the children to her care. While Mother was living with Father on the first day of trial, by the second day of trial she was living with a friend in a two-bedroom apartment. Mother is currently unemployed and cannot financially support her children.

Father is currently living in a home with his parents, which is owned by his parents. Although separated, at the time of trial, the parents were not divorced. Both Mother and Father failed to provide to the court with a realistic and believable scenario wherein a safe and stable home life could be provided to the children. The parents did not show the court that they could parent the children appropriately. Testimony was introduced that the parents continued to argue in front of the children during supervised visits. The parents also continued to use drugs while visiting the children; to either test positive for drugs or refuse the drug screens; and to be arrested on domestic violence charges.

We find that the trial court did not err in finding that Mother and Father failed to remedy persistent conditions preventing reunification with the children. The record shows that drug use and domestic violence continue to be issues with Mother and Father and that there is little likelihood that these conditions will be remedied at an early date. Mother is currently unemployed and living with a friend in an apartment that is not conducive to children. Father is currently living with his parents, who are of advanced age, and they are providing him with financial support. Father's father testified that he would not allow Mother to move into his house. Mother continues to test positive for drugs, and both parents have continued issues with violence. The persistence of these conditions is detrimental to the children and does not provide them with a safe, stable, and permanent home.

IV. Best Interest of the Children

To terminate parental rights, it is not only necessary to prove at least one of the grounds for termination, but the party seeking termination must also prove by clear and convincing evidence that terminating the parents' rights is in the best interest of the child. *See* Tenn. Code Ann. § 36-1-113(c)(2). The best interest of the child is to be determined from the perspective of the child rather than the parent. *See White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004). Tenn. Code Ann. § 36-1-113(i) provides a non-comprehensive list of factors to be considered in determining whether termination of parental rights is in the best interest of the child:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Id.

There is ample evidence supporting the trial court's conclusion that termination is in the best interest of the children. Neither Mother nor Father have made such an adjustment of circumstance, conduct or conditions as to make it safe or in their children's best interest to be in their home. The parents' respective struggles with drug abuse and domestic violence continue. Despite receiving domestic violence classes and completing alcohol and drug rehabilitation, the parents have not incorporated those programs into their lives. Mother is unemployed and currently unable to financially support her children. Father fails to regularly and consistently pay his court-ordered child support. Mother and Father have been physically and verbally abusive with each other, and Father sexually abused his niece in 1989. Neither parent's current home is conducive to children. Lastly, the children are currently in a safe, stable, sober and peaceful pre-adoptive home and are well adjusted. The foster parents are willing to adopt all three boys.

CONCLUSION

For the reasons set forth above, we affirm the judgment of the trial court terminating the parental rights of K. L. D. And D. R. D.

Costs are assessed equally to Appellants, K. L. D. and D. R. D., for which execution may issue if necessary.

RICHARD H. DINKINS, JUDGE